

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellant:	Bindu Rama Rao	Examiner:	Michael Young Won
Serial No.:	10/782,083	Group Art Unit:	2155
Filed:	February 19, 2004	Docket No.:	200701933-2
Title:	ELECTRONIC DEVICE NETWORK HAVING GRACEFUL DENIAL OF SERVICE		

APPEAL BRIEF UNDER 37 C.F.R. §41.37

Mail Stop Appeal Brief – Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is submitted in support of the Notice of Appeal filed on October 15, 2008, appealing the final rejection of claims 1-21 and 23-44 of the above-identified application as set forth in the Final Office Action mailed July 15, 2008.

The U.S. Patent and Trademark Office is hereby authorized to charge Deposit Account No. 08-2025 in the amount of \$540.00 for filing a Brief in Support of an Appeal as set forth under 37 C.F.R. §41.20(b)(2). At any time during the pendency of this application, please charge any required fees or credit any overpayment to Deposit Account No. 08-2025.

Appellant respectfully requests consideration and reversal of the Examiner's rejection of pending claims 1-21 and 23-44.

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REAL PARTY IN INTEREST

The real party in interest is Hewlett-Packard Development Company, LP having a principal place of business at 20555 S.H. 249 Houston, TX 77070, U.S.A. (hereinafter "HPDC"). HPDC is a Texas limited partnership and is a wholly-owned affiliate of Hewlett-Packard Company, a Delaware corporation, headquartered in Palo Alto, CA. The general or managing partner of HPDC is HPQ Holdings, LLC.

RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to Appellant that will have a bearing on the Board's decision in the present Appeal.

STATUS OF CLAIMS

In a Final Office Action mailed July 15, 2008, claims 1-21 and 23-44 were finally rejected. Claims 1-21 and 23-44 are pending in the application. Claims 1-21 and 23-44 are the subject of the present Appeal.

STATUS OF AMENDMENTS

No amendments have been entered subsequent to the Final Office Action mailed May 22, 2008.

SUMMARY OF THE CLAIMED SUBJECT MATTER

Independent claim 1 is directed to a method of managing incoming access requests 305 during an update event, such as a software update, from electronic devices 107 in a communication network 105. See paragraphs [0010] and [0081]. Each of the incoming access requests include at least on update-related parameter. See paragraph [0057]. The incoming access requests are received at least temporarily 307. See also paragraph [0065]. The incoming access requests are monitored and evaluated with the update-related parameter. See paragraph [0010]. The availability of at least one device server 129, 133 to process the incoming access requests is determined based on the update related parameters. Upon determining that a device server is available, the incoming access request is immediately processed. See paragraphs [0086] to [0088], and [0094]. Upon determining that the device

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servers are unavailable, a message is communicated to the electronic device requesting access. See paragraph [0087].

Independent claim 13 is directed to a method of managing incoming access requests 305 during an update event from electronic devices in a mobile electronic network. See paragraphs [0022] and [0081]. The incoming access requests include at least one update-related parameter and are evaluated. See paragraphs [0022] and [0057]. Incoming access requests that are rescheduled access requests are recognized. See paragraph [0092]. Rescheduled access requests are fulfilled with higher priority than original requests. See paragraphs [0022] and [0092].

Independent claim 19 is directed to an electronic device network 105 that can manage incoming access requests during an update event. See paragraph [0027]. Each of the access requests includes at least one access-related parameter. See paragraphs [0027] and [0057]. The network includes at least one mobile electronic device 107 that can be communicatively coupled to the network and that includes one of software or firmware. The network includes an access control unit 127 and at least one device server 129 or 133 operatively coupled to the access control unit. See paragraph [0027], Figures 1 and 2, and associated text. At least one memory is coupled to the device server. The access control unit immediately process and manage access requests incoming from the mobile electronic device 105. The access control unit determines an incoming access request volume at the device server. See paragraph [0062]. The access control unit also determines the ability of the of the device server to service additional incoming access requests. See paragraph [0027].

Independent claim 42 is directed to a method of managing incoming access requests 305 during an update event from electronic devices in a communications network. See paragraph [0010]. Each of the access requests includes a least one selection-related parameter. See paragraphs [0010] and [0057]. The incoming access requests are received at least temporarily. See paragraph [0065]. The incoming access requests are monitored and evaluated with the update-related parameter. See paragraph [0010]. The availability of at least one device server to process the incoming access requests is determined based on the update related parameters. Upon determining that the access request is likely to be successful, the incoming access request is immediately processed. See paragraphs [0086] to

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[0088], and [0094]. Upon determining that the access request is unlikely to be successful, a message is communicated to the electronic device requesting access. See paragraph [0087].

GROUND S OF REJECTION TO BE REVIEWED ON APPEAL

- I. Claims 1, 3-6, 8-11, 19-21, 23-31, 35-36, 38, and 40-43 stand rejected under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 in view of the Peart U.S. Patent No. 6,952,714.
- II. Claims 13-18 stand rejected under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 in view of the Vogl et al. U.S. Patent No. 6,959,327.
- III. Claims 2, 7, 12, 32-43, 37, 39, and 44 stand rejected under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 and the Peart U.S. Patent No. 6,952,714, and still further in view of the Vogl et al. U.S. Patent No. 6,959,327.

ARGUMENT

I. The Applicable Law

In making a 35 U.S.C. § 103 obviousness rejection, “Patent examiners carry the responsibility of making sure that the standard of patentability enunciated by the Supreme Court and by the Congress is applied in each and every case.” M.P.E.P. 2141 (emphasis in the original). The Examiner bears the burden under 35 U.S.C. § 103 in establishing a *prima facie* case of obviousness. *In re Fine*, 837 F.2d 1071, 1074 [5 USPQ2d 1596, 1598] (Fed. Cir. 1988).

One criteria that must be satisfied to establish a *prima facie* case of obviousness is the reference or combined references must teach or suggest all of the claim limitations. *In re Royka*, 490 F.2d 981 [180 USPQ 580] (C.C.P.A. 1974).

However, “[a] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1731 [82 USPQ2d 1385, 1389] (2007). In making an obviousness determination over a combination of prior art references, it is “important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *Id.* at 1738 [1396].

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In order to facilitate review of the determination of whether there was an apparent reason to combine known elements in the fashion claimed by the patent at issue, the “analysis should be made explicit.” *Id.* at 1738 [1396]. “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 [78 USPQ2d 1329] (Fed. Cir. 2006) (cited with approval in *KSR*, 127 S. Ct. at 1738 [82 USPQ2d at 1396])

The test for obviousness under § 103 must take into consideration the invention as a whole; that is, one must consider the particular problem solved by the combination of elements that define the invention. *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143 [227 USPQ 543, 551] (Fed. Cir. 1985). Furthermore, claims must be interpreted in light of the specification, claim language, other claims, and prosecution history. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 [1 USPQ2d 1593, 1597] (Fed. Cir. 1987), *cert. denied*, 481 U.S. 1052 (1987). At the same time, a prior patent cited as a § 103 reference must be considered in its entirety, “*i.e.* as a *whole*, including portions that lead away from the invention.” *Id.* That is, the Examiner must recognize and consider not only the similarities, but also the critical differences between the claimed invention and the prior art as one of the factual inquiries pertinent to any obviousness inquiry under 35 U.S.C. § 103. *In re Bond*, 910 F.2d 831, 834 [15 USPQ2d 1566, 1568] (Fed. Cir. 1990) (emphasis added).

Furthermore, the Examiner must avoid hindsight. *Id.* “A fact finder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” *KSR*, 127 S. Ct. at 1739 [82 USPQ2d at 1397] (citing to *Graham v. John Deere*, 383 U.S. 1 [148 USPQ 459] (1966) in warning against a temptation to read into the prior art the teachings of the invention at issue and instructing courts to guard against slipping into the use of hindsight).

“[W]hen the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious.” *KSR*, 127 S. Ct. at 1737 [82 USPQ2d at 1395] (citing to *United States v. Adams*, 383 U.S. 39, 51-52 [148 USPQ 479] (1966)).

In conclusion, an Appellant is entitled to a patent grant if a *prima facie* case of obviousness is not established. The Federal Circuit has endorsed this view in stating: “If

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examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the Appellant is entitled to grant of the patent.” In re Oetiker, 977 F.2d 1443, 1446 [24 USPQ2d 1443, 1448] (Fed. Cir. 1992).

II. Rejection of Claims 1, 3-6, 8-11, 19-21, 23-31, 35-36, 38, and 40-43 under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 in view of the Peart U.S. Patent No. 6,952,714.

The rejection based on Boivie in view of Peart includes three out of the four independent claims in the present appeal. In particular, the rejection based on Boivie in view of Peart includes independent claims 1, 19, and 42. Rejected claims 3-6 and 8-11 depend from independent claim 1. Rejected claims 20, 21, 23-31, 35, 36, 38, 40, and 41 depend from independent claim 19. And rejected claim 43 depends from independent claim 42.

In this section, Appellants will demonstrate that the pending claims are patentably distinguishable from the combination of Boivie in view of Peart for at least the reasons of (A) The rejected claims include features that are not shown in Boivie or Peart separately and therefore the features can not be found in any proposed combination of the references; (B) that the teachings of Boivie and Peart are improperly combined based only on hindsight reasoning or both.

A. The Features of Claims 1, 3-6, 8-11, 19, 20, 21, 23-31, 35, 36, 38, 40-42, and 43 are Not Shown in any Proposed Combination of the References

1. Independent Claim 1 is Patentably Distinguishable from the Combination of References

Appellants respectfully submit that independent claim 1 is patentably distinguishable from the combination of Boivie and Peart. Claim 1 includes the features of “A method of managing incoming requests access requests during an update event from a plurality of electronic devices in a communications network” including “monitoring and evaluating the incoming access requests using the at least one update-related parameter.” Appellants will demonstrate how these features are not in either of the prior art references separately and thus could not appear in any proposed combination of Boivie and Peart.

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The Final Office Action states at page 3 that “Boivie does not explicitly teach “monitoring and evaluating the incoming access requests using the at least one update-related parameter.” Appellants agree with this statement in the Final Office Action. The Final Office Action, however, goes on to state that Peart teach the features of “monitoring and evaluating the incoming access requests using the at least one update-related parameter” at Peart column 29, lines 55-58 that state “request typically includes parameters that identifies the selected data file on the web server.” Appellants dispute that the above features of claim 1, inter alia, are found in Peart.

Peart teaches collecting associated file types, or AFTs, (this can include data files and associated applications that will use the data files such as .doc data files and word processor programs that will work with .doc data files) that may be distributed on different nodes on a network, and providing this to a client computer. The cited teachings of Peart of “request typically includes parameters that identifies the selected data file on the web server” at column 29, lines 55-58, are preceded by the statement “In response to providing the selected data file, the client node receives an execution request (Step 292).”

The teaching of Peart is not found in the claims because the direction of traffic taught in Peart is in an opposite direction and for a different purpose than that set out in claim 1. Independent claim 1 sets forth “A method of managing incoming requests access requests during an update event from a plurality of electronic devices in a communications network,” where “the incoming access requests” throughout the claim are from the electronic devices, i.e., the client node, rather than in the other direction. There is simply no teaching or suggestion in Peart that the parameter in the reference would have any use if it were sent from the client node to the server node.

Appellants further submit that the rejection of independent claim 1 is contrary to established claim interpretation principles. More particularly, the Final Office Action does not give patentable weight to the features of “update-related parameter” which is based on the “update event” set forth above. Instead, the Final Office Action summarily concludes that the “update parameter” is simply any parameter, without regard to its explicit relationship to other claim limitations. Accordingly, this overly broad interpretation of “update-related parameter” is unreasonable.

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When the limitation of “update-related parameter” is given a reasonable interpretation based on the limitation of an update-event, the feature of an “update-related parameter” is not found in the references. Boivie and Peart do not teach or otherwise relate to an “update event.” The teachings of Boivie relate to regulating web access based on excess bandwidth use. There is simply no teaching or suggestion of updating the software of the client computers. Also, the teachings in Peart of collecting at a client node a set of associated file types on a distributed network neither mentions nor suggests using a parameter related to an update event.

Because these features are missing from the prior art references of Boivie and Peart, they cannot be found in any proposed combination of the references. Thus, Appellants respectfully request removal of the rejection of claim 1 based on the combination of Boivie and Peart.

2. Claims 3-6 and 8-11 are Patentably Distinguishable from the Combination of the References

Claims 3-6 and 8-11 depend from independent claim 1, which has been demonstrated to include features not found in the proposed combination of Boivie and Peart. Claims 3-6 and 8-11 further define the features of independent claim 1. Further, claims 3-6 and 8-11 include all of the limitations of independent claim 1 by virtue of their dependency. Accordingly, Appellants respectfully submit that claims 3-6 and 8-11 are also patentably distinguishable from the proposed combination of Boivie and Peart.

3. Claims 19-21, 23-31, 35, 36, 38, 40, and 41 are Patentably Distinguishable from the Combination of the References

Appellants respectfully submit that independent claim 19 is patentably distinguishable from the combination of Boivie and Peart. Claim 19 includes the features of “An electronic device network adapted to manage incoming access requests during an update event, . . . comprising, . . . at least one mobile electronic device . . . being communicatively coupled to the mobile electronic device network . . . wherein an access control unit [of an at least one device server] is adapted to process and manage incoming access requests from the at least one mobile electronic device.” As mentioned above with respect to independent claim 1,

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these features are not show in Boivie or Peart and thus would be missing from any proposed combination of the references.

Claims 20, 21, 23-31, 35, 36, 38, 40, and 41 depend from independent claim 19, which has been demonstrated to include features not found in the proposed combination of Boivie and Peart. Claims 20, 21, 23-31, 35, 36, 38, 40, and 41 further define the features of independent claim 19. Further, claims 20, 21, 23-31, 35, 36, 38, 40, and 41 include all of the limitations of independent claim 1 by virtue of their dependency. Accordingly, Appellants respectfully submit that claims 19 20, 21, 23-31, 35, 36, 38, 40, and 41 are also patentably distinguishable from the proposed combination of Boivie and Peart.

4. Independent Claims 42 and 43 are Patentably Distinguishable from the Combination of References

Appellants respectfully submit that independent claim 42 is patentably distinguishable from the combination of Boivie and Peart for the same reasons as above. Claim 42 is analogous to Claim 1 and includes the features of “A method of managing incoming access requests during an update event from a plurality of electronic devices in a communications network” including “monitoring and evaluating the incoming access requests using the at least one selection-related parameter.” For the reasons stated above with respect to independent claim 1, Appellants respectfully submit that independent claim 42 is patentably distinguishable from the combination of Boivie and Peart.

Claim 43 depends from independent claim 42, which has been demonstrated to include features not found in the proposed combination of Boivie and Peart. Claim 43 further defines the features of independent claim 42. Further, claim 43 includes all of the limitations of independent claim 42 by virtue of its dependency. Accordingly, Appellants respectfully submit that claims 42 and 43 are also patentably distinguishable from the proposed combination of Boivie and Peart.

B. The References of Boivie and Peart are Improperly Combined

The Office Action at pages 4 and 6 argues that “It would have been obvious to a person of Ordinary skill in the art . . . to modify the systems of Boivie in view of Peart.” This conclusion is missing an explicit analysis of why the claims would have been obvious.

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Appellants respectfully dispute this conclusion, and they will demonstrate with a proper analysis that one skilled in the art would not combine the teachings of Boivie and Peart to solve the problem facing the Appellants. Thus, Appellants submit that the rejection of the claims based on the combination of Boivie in view of Peart is based on improper hindsight reasoning and should be removed.

1. The Motivation Set Forth in the Office Action is Not Applicable to the References

The Office Action at pages 4 and 6 states, “It would have been obvious to a person of Ordinary skill in the art . . . to modify the systems of Boivie in view of Peart by implementing monitoring and evaluating the incoming access requests using the at least one [update/selection]-related parameter. One would be motivated to do so because this would allow the request to reach the appropriate destination to be serviced.” Assuming here that this motivation exists, it does not follow that one skilled in the art would combine Boivie in view of Peart based on a more careful reading of the prior art.

If the motivation could indeed be to allow the request to reach the appropriate destination, the Peart teaches an opposite direction of the requests than that set forth in the rejected claims. For example, the destination of the request in Peart is the client computer, which is connected to the server. The teachings of Peart of “request typically includes parameters that identifies the selected data file on the web server” at column 29, lines 55-58, are preceded by the statement “In response to providing the selected data file, the client node receives an execution request (Step 292).”

In contrast, the rejected claims set forth that the requests are provided from the electronic devices (i.e., clients) and the destination is the management system of the network, such as the servers. For example, independent claims 1 and 42 set forth “A method of managing incoming requests access requests during an update event from a plurality of electronic devices in a communications network,” where “the incoming access requests” throughout the claim are from the electronic devices, i.e., the client node, rather than in the other direction. Independent claim 19 includes the features of an electronic device network adapted to manage incoming access requests during an update event, comprising at least one mobile electronic device being communicatively coupled to the mobile electronic device

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network wherein a device server is adapted to process and manage incoming access requests from the at least one mobile electronic device.

In each of these independent claims, the destination of the request is to the server or management system, and is not to the client computer as taught in Peart. Accordingly, even if the motivation was to allow the request to reach the appropriate destination to be serviced, a careful reading of the prior art compared to the rejected claims would demonstrate movement of the requests and destinations in opposite directions.

2. Boivie and Peart are Non-Analogous References

Appellants dispute that a person of ordinary skill in the art to which the invention pertains would consult the references of Boivie and Peart. Instead, Appellants submit Boivie and Peart are not analogous to the present claims and also that the references are not analogous to each other.

Guidance on the question of whether a reference should be treated as prior art which is in a field analogous to the technological field of the claimed invention is provided example by *In re Clay*, 966 F.2d 656, which reviewed the evolved criteria and stated what is essentially a two-tier test for evaluation of the field of the prior art. First, one should consider if the art is from the same field of endeavor. Secondly, if the art is not from the same field of endeavor, one should address the question of whether the reference is still reasonably pertinent to the particular problem with which the inventor is involved.

a. Boivie and Peart are Not from the Same Field of Endeavor

With regard to the first criteria, neither Boivie nor Peart are from the same field of endeavor. In general, the present claims relate to providing software and firmware updates to mobile electronic device over a communications network. More particularly, independent claims 1 and 42 relate to “A method of managing incoming requests access requests during an update event from a plurality of electronic devices in a communications network,” and independent claim 19 relates to “An electronic device network adapted to manage incoming access requests during an update event.”

In contrast, Boivie relates to “Internet World Wide Web (WWW) sites of various owners hosted by a service provider using a cluster of group of servers and meeting with

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agreed upon service levels,” as set forth in column 1, lines 10-14. Boivie teaches managing the link between clients with web browsers attempting to access one of several hosted web sites. There is no disclosure or suggestion in Boivie of an “update event” or how to provide software and firmware updates to electronic devices. Further, there is mention in the prior art or in the present disclosure of any link between the use service level agreements and updates to software for devices that make use of a communications network.

Peart relates to collecting associated file types together to provide a working relationship between an application and data files. This can include data files and associated applications that will use the data files such as .doc data files and word processor programs that will work with .doc data files. The applications and data files are distributed on different nodes of a network, and are provided to a client computer. Peart does not relate to either “managing incoming requests access requests during an update event from a plurality of electronic devices in a communications network” of the present claims, and it does not relate to “a service provider using a cluster of group of servers . . . meeting . . . agreed upon service levels” of Boivie.

Appellants submit that it is unreasonable to believe that all disclosures that involve use of communications networks are related. The field is vast and requires specialization in the various aspects of communications. In the present case, Boivie teaches the use of service level agreements to manage bandwidth whereas the independent claims 1, 19, and 42 are directed generally to managing a software or firmware update. Peart is related to finding files on a distributed network.

Accordingly, the cited art of Boivie and Peart are not from the same field of endeavor as the present claims.

b. Boivie and Peart are Not Pertinent to the Particular Problem

With regard to the second criteria, neither Boivie nor Peart are reasonably pertinent to the particular problem address in the claims. The present claims address the problem of receiving requests from electronic devices to re-schedule software updates to a more convenient time because in the prior art such requests were overwhelming and unmanageable to the update system.

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In contrast, Boivie addresses the problem of a single customer's traffic in the server from monopolizing the entire bandwidth resource and penalizing other customers as mentioned in column 3, lines 14-17. Boivie teaches a system and method that guarantee and deliver the communications link bandwidth-based Service Level Agreements to customers whose Web sites are hosted by the server, as stated at column 3, lines 50-54. The problem in Boivie is the amount of bandwidth from the server rather than the incoming requests to the network as in the present claims. Peart addresses the problem of associating file types for distributed networks so as to work like desktop computers, as mentioned in column 2, lines 20-24.

Neither Boivie nor Peart are relevant to the particular problem addressed in the present claims.

Therefore, because Boivie and Peart each fail the two-tier test, neither Boivie nor Peart can be considered analogous art for the purposes of determining obviousness.

3. Boivie and Peart Do Not Recognize the Problem Facing Appellants and Do Not Suggest a Solution

One skilled in the art of providing a software update to electronic devices on a network would not be motivated to use the teachings of Boivie to solve the problems of managing incoming requests from the electronic devices. Boivie teaches a system that provides responses to requests from the client computers based on the available bandwidth for the servers responding to the requests. In particular, Boivie teaches at column 6, lines 5-11, "the output on the outgoing data path can be monitored and it can be observed how much output is generated. If the amount of bandwidth being used by a particular customer exceeds the number of the bandwidth per SLA [Service Level Agreement], then feedback can be generated to reduce the number of inbound requests being accepted."

At the highest level of abstraction, and without regard to an update or service event as set forth in the claims, the present claims deal with a problem unrelated to that of Boivie. In particular, the present claims deal with the problem of managing incoming requests from the electronic devices, and the amount of bandwidth needed for the server to provide responses to these requests does not pose a problem. In Boivie, the outgoing responses to the requests, rather than the requests themselves, present the problem that needs to be managed. Further,

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the problem facing Appellants has no bearing on a server exceeding a particular maximum bandwidth. One skilled in the art would not be inclined to start with a reference that manages incoming requests in response to the amount of outgoing responses, such as Boivie, to solve the problem facing the Appellants.

4. The Rejection of Claims 1, 3-6, 8-11, 19-21, 23-31, 35 36, 38, and 40-44 should be Removed

The rejection of claims 1, 3-6, 8-11, 19-21, 23-31, 35 36, 38, and 40-44 are based on the combination of Boivie in view of Peart. As discussed above, the references are improperly combined on the basis of hindsight. The motivation set forth in the Final Office Action is not applicable based on a careful reading of Peart. Instead, a proper analysis concludes that the references are non-analogous, and that one skilled in the art faced with the problem that Appellants are trying to solve would not be inclined to consult Boivie for guidance. Based on the improper combination of Boivie and Peart, Appellants respectfully request that claims 1, 3-6, 8-11, 19-21, 23-31, 35 36, 38, and 40-44 be withdrawn.

III. Rejection of Claims 13-18 under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 in view of the Vogl et al. U.S. Patent No. 6,959,327.

Claims 13-18 were rejected as being unpatentable over Bovie in view of Vogl. Claims 14-18 depend directly on independent claim 13. As discussed above, Bovie is both non-analogous art and one skilled in the art faced with the problem that Appellants are trying to solve would not be inclined to consult Boivie for guidance. Accordingly, Appellants submit that the combination of Bovie and Vogl is improper and based upon hindsight reasoning. Appellants respectfully submit that the rejection of claims 13-18 based on the combination of Boivie and Vogl be withdrawn.

IV. Rejection of Claims 2, 7, 12, 32-34, 37, 39, and 44 under 35 U.S.C. §103(a) as being unpatentable over the Boivie et al. U.S. Patent No. 6,842,783 and the Peart U.S. Patent No. 6,952,714, and still further in view of the Vogl et al. U.S. Patent No. 6,959,327.

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A. The Rejection of Claims 2, 7, and 12 Should be Removed

Rejected claims 2, 7, and 12 depend from independent claim 1, which has been shown above to be patentably distinguishable from any proposed combination of Boivie and Peart. Appellants respectfully submit that the features of independent claim 1 that are missing from the combination of Boivie and Peart, as set forth above with respect to the rejection of claim 1, are not shown or made obvious with the addition of Vogl. Further, Appellants respectfully submit that both Boivie and Peart are not properly combined, as set forth above, and thus any proposed combination of Boivie, Peart, and Vogl would also be based on improper hindsight. Accordingly, Appellants respectfully request removal of the rejections of claims 2, 7, and 12.

B. The Rejection of Claims 32-34, 37, and 39 Should be Removed

Rejected claims 32-34, 37, and 39 depend from independent claim 19, which has been shown above to be patentably distinguishable from any proposed combination of Boivie and Peart. Appellants respectfully submit that the features of independent claim 19 that are missing from the combination of Boivie and Peart, as set forth above with respect to the rejection of claim 19, are not shown or made obvious with the addition of Vogl. Further, Appellants respectfully submit that both Boivie and Peart are not properly combined, as set forth above, and thus any proposed combination of Boivie, Peart, and Vogl would also be based on improper hindsight. Accordingly, Appellants respectfully request removal of the rejections of claims .

C. The Rejection of Claim 44 Should be Removed

Rejected claim 44 depends from independent claim 42, which has been shown above to be patentably distinguishable from any proposed combination of Boivie and Peart. Appellants respectfully submit that the features of independent claim 42 that are missing from the combination of Boivie and Peart, as set forth above with respect to the rejection of claim 42, are not shown or made obvious with the addition of Vogl. Further, Appellants respectfully submit that both Boivie and Peart are not properly combined, as set forth above, and thus any proposed combination of Boivie, Peart, and Vogl would also be based on

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improper hindsight. Accordingly, Appellants respectfully request removal of the rejections of claim 43.

CONCLUSION

For the above reasons, Appellants respectfully submit that the cited references neither anticipate nor render obvious claims of the pending Application. The pending claims distinguish over the cited references, and therefore, Appellants respectfully submit that the rejections must be withdrawn, and respectfully request the Examiner be reversed and claims 1-21 and 23-44 be allowed.

Any inquiry regarding this Amendment and Response should be directed to either Patrick G. Billig at Telephone No. (612) 573-2003, Facsimile No. (612) 573-2005 or Clare Hartnett at Telephone No. (408) 447-0289, Facsimile No. (408) 447-0854. In addition, all correspondence should continue to be directed to the following address:

IP Administration
Legal Department, M/S 35
HEWLETT-PACKARD COMPANY
P.O. Box 272400
Fort Collins, Colorado 80527-2400

Respectfully submitted,

Bindu Rama Rao,

By his attorneys,

DICKE, BILLIG & CZAJA, PLLC
Fifth Street Towers, Suite 2250
100 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 573-2003
Facsimile: (612) 573-2005

Date: December 9, 2008

PGB:cms

/Patrick G. Billig/

Patrick G. Billig
Reg. No. 38,080

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CLAIMS APPENDIX

1. (Previously Presented) A method of gracefully managing incoming access requests during an update event from a plurality of electronic devices in a communication network, each of the incoming access requests comprising at least one update-related parameter, the method comprising:
 - receiving each incoming access request at least temporarily;
 - monitoring and evaluating the incoming access requests using the at least one update-related parameter;
 - determining the availability of at least one device server to process the incoming access requests, based upon the at least one update-related parameter;
 - immediately processing incoming access requests upon determining that the at least one device server is available; and
 - communicating at least one message to electronic devices requesting access upon determining that the at least one device server is unavailable.
2. (Original) The method according to claim 1, wherein communicating comprises determining at least one alternate schedule for the electronic device to send a rescheduled access request upon determining that the at least one device server is unavailable for processing, based upon the at least one update-related parameter.
3. (Original) The method according to claim 1, wherein the at least one update-related parameter comprises at least one of device identification information, firmware identification information, software identification information, and information regarding other resources available in the electronic device.
4. (Original) The method according to claim 1, wherein the at least one message comprises a denial of service message.
5. (Original) The method according to claim 4, wherein the denial of service message comprises at least one reason for service denial.

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6. (Original) The method according to claim 1, wherein determining the availability of the at least one device server to process the incoming access requests comprises evaluating at least one of an expected volume of requests, collected statistical information, user profile, request profile, and heuristics.
7. (Original) The method according to claim 1, further comprising graceful communication termination, wherein graceful communication termination comprises communicating an alternate schedule to send a rescheduled access request along with an explanatory denial of service message.
8. (Original) The method according to claim 1, wherein monitoring and evaluating the incoming access requests further comprises periodically retrieving a status information communication from one of the at least one device server and at least one of the plurality of electronic devices.
9. (Original) The method according to claim 1, wherein monitoring and evaluating the incoming access requests further comprises monitoring at least one network resource, operational status of the at least one device server, a volume of incoming access requests, and information regarding at least one of the plurality of electronic devices.
10. (Original) The method according to claim 1, further comprising selecting a candidate device server to process an incoming access request based upon monitored information regarding the at least one device server.
11. (Original) The method according to claim 1, wherein the at least one electronic device comprises a plurality of mobile electronic devices, and wherein the plurality of mobile electronic devices comprise at least one of a mobile cellular phone handset, personal digital assistant, pager, MP3 player, and a digital camera.
12. (Original) The method according to claim 1, wherein the at least one message comprises alternate schedule information, wherein the alternate schedule information

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comprises at least one of a time to re-submit an access request, a particularly time frame for re-submitting an access request, an amount of time that must elapse before re-submitting an access request, and a particular date for re-submitting an access request.

13. (Previously Presented) A method of gracefully managing incoming access requests during an update event from a plurality of electronic devices in a mobile electronic network, the method comprising:

evaluating the incoming access requests, the incoming access requests at least comprising at least one update-related parameter;

recognizing that an incoming access request is a rescheduled access request; and

fulfilling the rescheduled access request with higher priority than an original request.

14. (Original) The method according to claim 13, wherein the rescheduled access request is an incoming access request that was previously denied.

15. (Original) The method according to claim 13, wherein fulfilling the rescheduled access request with higher priority than an original request comprises advancing the rescheduled request in a processing queue.

16. (Original) The method according to claim 13, wherein fulfilling the rescheduled access request with higher priority than an original request comprises immediately placing the rescheduled request in the processing queue.

17. (Original) The method according to claim 13, wherein the at least one mobile electronic device comprises a plurality of electronic devices, and wherein the plurality of electronic devices comprise at least one of a mobile cellular phone handset, personal digital assistant, pager, MP3 player, and a digital camera.

18. (Original) The method according to claim 13, wherein the at least one update-related parameter comprises at least one of device identification information, firmware identification

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information, software identification information, and information regarding other resources available in the electronic device.

19. (Previously Presented) An electronic device network adapted to gracefully manage incoming access requests during an update event, each of the incoming access requests comprising at least one update-related parameter, the electronic device network comprising:

at least one mobile electronic device having one of software and firmware, the mobile electronic device being adapted to be communicatively coupled to the electronic device network;

an access control unit;

at least one device server operatively coupled to the access control unit; and

a memory operatively coupled to the at least one device server, wherein the access control unit is adapted to immediately process and manage incoming information access requests from the at least one electronic device, and wherein the access control unit is adapted to determine an incoming access request volume at the at least one device server and ability of the at least one device server to service additional incoming access requests.

20. (Original) The electronic device network according to claim 19, wherein the at least one mobile electronic device comprises a plurality of electronic devices, and wherein the plurality of electronic devices comprise at least one of a mobile cellular phone handset, personal digital assistant, pager, MP3 player, and a digital camera.

21. (Original) The electronic device network according to claim 19, wherein the at least one device server comprises a plurality of device servers adapted to dispense updates to a plurality of update requesting electronic devices.

22. (Cancelled)

23. (Original) The electronic device network according to claim 19, further comprising a monitoring unit adapted to monitor activity of the at least one device server.

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24. (Original) The electronic device network according to claim 19, wherein the memory further comprises a plurality of updates retrievable by the at least one device server.
25. (Original) The electronic device network according to claim 19, wherein the at least one mobile electronic device comprises random access memory and nonvolatile memory, and wherein the non-volatile memory comprises at least one of an update application loader, update agent, download agent, and an operating system.
26. (Original) The electronic device network according to claim 19, wherein an incoming access request comprises at least one of device identification information, firmware identification information, software version information, and resource availability information.
27. (Original) The electronic device network according to claim 19, wherein the access control unit is adapted to determine priority of an incoming access request by recognizing that the incoming access request is one of a repeated and rescheduled access request.
28. (Original) The electronic device network according to claim 19, wherein the access control unit is adapted to determine one of whether a particular incoming access request requires immediate processing, whether the incoming access request requires deferment, and whether the incoming access request requires denial based upon operational status information gathered by monitoring the at least one device server and by evaluating the incoming access request.
29. (Original) The electronic device network according to claim 28, wherein upon determining that the incoming access request requires denial, the access control unit communicates at least one message to the mobile electronic device.
30. (Original) The electronic device network according to claim 29, wherein the at least one message to the mobile electronic device comprises a denial of service message.

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31. (Original) The electronic device network according to claim 29, wherein the at least one message to the mobile electronic device comprises at least one reason for service denial.

32. (Original) The electronic device network according to claim 29, wherein upon determining that the incoming access request requires denial, the access control unit is adapted to determine at least one alternate schedule for the mobile electronic device to send a rescheduled access request.

33. (Original) The electronic device network according to claim 29, wherein upon determining that the incoming access request requires denial, the access control unit is adapted to communicate at least one alternate schedule to the mobile electronic device along with the at least one message.

34. (Original) The electronic device network according to claim 29, wherein a rescheduled access request is an incoming access request that was previously denied service, the rescheduled access request is determined to have higher priority than an original incoming access request, and wherein the rescheduled access request is one of immediately placed in the processing queue and advanced in the processing queue.

35. (Original) The electronic device network according to claim 29, wherein a rescheduled request is rapidly advanced in the processing queue.

36. (Original) The electronic device network according to claim 28, wherein upon determining that the incoming access request requires denial, a denial of service message is displayed at the mobile electronic device.

37. (Original) The electronic device network according to claim 28, wherein upon determining that the incoming access request requires denial, a message comprising instructions for re-attempting the denied access request at one of a specific time and after a period of time has elapsed and an explanatory message is displayed at the mobile electronic device.

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38. (Original) The electronic device network according to claim 27, wherein the access control unit is adapted to at least briefly accept all incoming communications.

39. (Original) The electronic device network according to claim 19, further comprising a monitoring unit, the monitoring unit being adapted to gracefully manage denial of service for incoming access requests by:

- monitoring a volume of incoming access requests;
- determining device server availability;
- providing monitored information to the access control unit;
- determining alternative schedules for mobile electronic devices to re-attempt access requests; and
- communicating the alternative schedules to the mobile electronic devices.

40. (Original) The electronic device network according to claim 19, wherein the mobile electronic devices are adapted to one of:

- repeat denied access requests without end-user intervention;
- prompt an end-user to initiate repeated access requests;
- display alternative schedules communicated to the mobile electronic device;
- prompt the end-user to select a particular alternative schedule; and
- autonomously repeat the access request according to a selected alternative schedule.

41. (Original) The electronic device network according to claim 19, wherein the at least one update-related parameter comprises at least one of device identification information, firmware identification information, software identification information, and information regarding other resources available in the electronic device.

42. (Previously Presented) A method of gracefully managing incoming access requests during an update event from a plurality of electronic devices in a communication network, each of the incoming access requests comprising at least one selection-related parameter, the method comprising:

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receiving each incoming access request at least temporarily;
monitoring and evaluating the incoming access requests using the at least one selection-related parameter;
determining whether the incoming access requests is are able to be processed based upon the at least one selection-related parameter;
immediately processing incoming access requests upon determining that processing the incoming access request is likely to be successful; and
communicating at least one message to the electronic device requesting access upon determining that processing the incoming access request is unlikely to be successful.

43. (Original) The method according to claim 42, wherein the at least one message communicated to electronic device comprises schedule information useable by the electronic device to re-attempt access employing another incoming access request.

44. (Original) The method according to claim 42, wherein the at least one message communicated to electronic device comprises a schedule information indicating a time when the communication network is likely to be able to provide one of requested information and data to the electronic device.

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EVIDENCE APPENDIX

None.

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RELATED PROCEEDINGS APPENDIX

None.